Since Respondent left, Austin had not shown any adverse effects. (T. 144) In addition, he testified that it would be detrimental to the welfare of Austin for Respondent to have visitation. Should Petitioner remarry, Austin could be confused about having three mothers in his life. (T. 143)

Martha Wiley from the day care center that Austin attended testified that Austin had attended the center for over two years. She stated that Austin was a happy child who always talked about his father. (T. 178) He never mentioned anything about Respondent. In fact, she did not know about Respondent until she appeared at the school after the parties had separated. She had no idea that Respondent was Austin's step-mother. (T. 179) This was Respondent's only visit to the center and during the visit, Austin had no interaction with Respondent. (T. 179)

Petitioner's mother testified that she talked to Austin after the separation and Austin could not understand why Respondent would leave his father. (T. 183) She also testified that Austin never cried for Respondent or showed any signs of missing Respondent. (T. 183)

Austin's babysitter testified that she questioned Austin about whether he missed Respondent. Austin told her that he did not miss Respondent. She also testified that Austin never acted like he missed Respondent. (T. 185)

Based upon the evidence, the trial court determined that Respondent stood *in loco parentis* to Austin and awarded her visitation rights. Following the trial court's ruling, Petitioner filed a motion to reconsider under *Troxel v. Granville*, 530 U.S. 57 (2000). The trial court never responded to the motion to reconsider and it was denied without action.

C. The appeal

Petitioner filed a timely appeal to the Arkansas Court of Appeals and the order of the trial court was affirmed on October 27, 2004. The case was brought before the Arkansas Supreme Court on a petition for review, and the Court granted review.

In a split decision, the Arkansas Supreme Court determined that the trial court was correct in awarding visitation to the step-parent based upon a finding that Respondent stood *in loco parentis* to Austin and it was in the child's best interest to grant visitation. The majority opinion of the Court failed to address the fundamental rights of a parent.

Justice Tom Glaze, dissenting in the case, wrote:

> Unlike our prior Arkansas case law, our court in *Linder* began its review with the analysis that Lea Ann Linder, a single parent, had a fundamental right under the *Fourteenth Amendment* in *prohibiting state intrusion* on her parenting of her son. The *Linder* court, quoting Justice O'Conner favorably, stated: "Impingement on a parent's fundamental liberty right to raise children requires heightened review and that one 'special factor' that might warrant state interference was if the parent were declared unfit." Put another way, if a parent is unfit, then clearly, under this approach, the state intrusion with the relationship is warranted.
>
> The *Linder* case involved grandparents' visitation rights given them with their grandson by the trial court, even though the boy's mother, Lea Ann, was declared fit. Lea Ann successfully reversed the lower court's award of visitation rights

> to the grandparents, but this court upheld Arkansas' Grandparent Visitation Act (GPVA) as facially constitutional, but concluded the act had been erroneously applied by the trial court. *See Ark. Code Ann. § 9-13-101* (Repl. 20020; now *Ark. Code Ann. § 9-13-103* (Supp. 2003).
>
> It appears to me that, by this court's decision in *Freeman v. Rushton, ___ Ark. ___, ___ S.W.3d ___, 2005 Ark. LEXIS 49 (January 27, 2005)*, and its decision here today, our court is giving no real discussion or guidance regarding the *Linder* and *Troxel* holdings, and, instead, glosses over the constitutional, fundamental right a fit parent has concerning his or her child's care, custody, and control. So long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. To hold otherwise, if a judge disagrees with the parents' estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, a court can disregard and overturn *any* decision by a fit, custodial parent concerning visitation whenever, as noted above, the third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests.

The Court obviously ignored Petitioner's rights under due process when it continued to follow prior case law allowing a visitation solely upon a finding of the child's best interest.

REASONS FOR GRANTING THE PETITION

I.

The due process implications of granting step-parent visitation over the objection of the natural parent is an important question that needs to be decided by this court. The Arkansas Supreme Court has created a de facto and unconstitutional exception to this Court's cases by holding that the interest of a parent can be interfered with based solely upon a preponderance of evidence that visitation with a non-parent is in the best interest of a child.

The due process implications of the Question Presented are far reaching and multifaceted. A parent's choice regarding the upbringing of children is a right this Court has ranked as being of basic importance in our society and sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

The circumstances of this case present several due process issues within the Question Presented that should be resolved by this Court (Point A, *infra*): (1) Can a court ignore the wishes of the natural parent in regards to non-parent visitation without violating due process? (2) Are there due process implications in the use of the preponderance of evidence standard to determine the best interest of a child? (3) Does allowing non-parent visitation without evidence of harm to the child undermine the due process? (4) Does the use of the best interest test in determining step-parent visitation also violate equal

protection? These are all important questions that are supported by cases of this Court or are contrary to cases from other states, and these issues should be resolved in this case.

A. The ruling of the Arkansas Supreme Court conflicts with prior holdings of this Court and should now be resolved by this Court

The interest of a parent in raising their children without state interference has been given constitutional protection in a long line of cases stemming from *Meyer v. Nebraska,* 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) this Court stated that "the primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition . . . " Recently this Court addressed the validity of a grandparent visitation statute and stated that "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests." *Troxel v. Granville*, 530 U.S. 57 (2000) The Due Process Clause of the Fourteenth Amendment is the barrier that protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children from the actions of the State. *Id.* at 66-67. It is without dispute that a fit parent's right to make decisions for his children should not be interfered with by the State even when a judge believes that the parent is making the wrong decision.

The justification for the constitutional protection given a parent in regards to the raising of their children is four-fold. First, parental autonomy, unlike state-imposed childrearing, promotes pluralism since every parent will

raise their children in a different fashion. This is a positive value in our society, where the prevailing political philosophy dictates that the state may not standardize its citizens.

Second, even if society wanted to specify and produce "ideal" adults, it is unlikely that we could arrive at a consensus on what constitutes such an adult. Even if we were able to reach a consensus, we would still be unable to predict what set of influences will cause a child to develop into that perfect adult and not have a judicial system sufficient to implement these influences on the parents. A doctrine favoring parental autonomy is therefore as likely as any other to produce healthy, functional members of society.

Third, parents can be presumed to be interested in promoting their children's interests and to know these interests better than anyone outside the nuclear family. In *Parham v. J.R.*, 442 U.S. 584 (1979), the Supreme Court stated that "historically it has been recognized that natural bonds of affection lead parents to act in the best interest of their children".

Fourth, the division of the child-raising among several individuals is not in the best interest of the child. The limitation of having the parent make the decisions regarding childrearing is sensible, and even necessary, since dividing it among too many persons would result in inconsistences and lapses of attention in the child's upbringing.

In *Troxel v. Granville*, supra, this Court released a plurality decision regarding the constitutionality of a grandparent visitation statute. After establishing that a parent had rights protected by due process, the Court first

noted that there was no finding or allegation that the parent was unfit. This was important due to the fact that there exists a presumption that "fit parents act in the best interests of their children." *Id.* Secondly, the Plurality addressed the fact that the lower court did not give any special weight to the parent's opinion regarding the best interest of the children. *Id.* Justice O'Connor indicated that the failure to give special weight to the opinion of the parent in effect shifted the burden of proof upon the parent to show that the visitation was not in the children's best interest.

Justice Souter took the position that the failure to require a finding of harm to the children before visitation could be granted invalidated the statute. He warned that without such protection, there could be judicially compelled visitation by any party at any time a judge believed he could make a better decision. *Id.*

Justice Thomas wrote a separate concurring opinion stating that the standard of review to be applied is strict scrutiny since the statute infringes upon a parent's fundamental right. He determined that under the strict scrutiny standard, the State lacked a compelling interest to second-guess a fit parent's decision regarding visitation with a third party. *Id.*

While the *Troxel* opinion re-emphasized the rights of a parent, it failed to clarify critical issues regarding non-parent visitation. It is unclear the extent weight should be given to the opinion of the parent or the standard of proof necessary to overcome the opinion of the parent. It also fails to clarify whether the non-parent must show harm would be caused to the children by the denial of visitation and the standard of proof to establish such harm. Without

clarification by this Court, there is great room for variation and abuse of discretion by state courts.

A prime example is the present case where the trial court and the Arkansas Supreme Court ignored *Troxel* and determined that a step-parent was entitled to visitation. The basis of the decision was that Respondent had established by a preponderance of the evidence that she stood *in loco parentis* with the child[1] and that it was in the best interest of the child to grant the visitation. Thus, the Arkansas Supreme Court and the trial court substituted its opinion for that of a fit parent in clear contradiction to *Troxel*.

1. The trial court's and Arkansas Supreme Court's ignoring the wishes of the natural parent violates due process and *Troxel v. Granville*.

There is no dispute that Petitioner is a fit parent and able to make decisions regarding the welfare of his son. It is Petitioner's decision that Respondent should not have visitation with Austin since Petitioner honestly believes that it will be detrimental to the welfare of the child. In *Troxel* this Court indicated that special weight should be given to the wishes of the natural parent. Neither the trial

[1] While Petitioner disputes whether there was sufficient evidence to establish by a preponderance of evidence that Respondent stood *in loco parentis* to Austin, it will not be addressed herein. It is Petitioner's position that the standard of proof should have been by clear and convincing evidence to overcome Petitioner's fundamental rights. Thus, it is the standard of proof applied by the court and the court's failure to give special weight to the Petitioner's opinion that created the constitutional violation.

court nor the Arkansas Supreme Court gave any weight to Petitioner's wishes. Instead, the courts decided to rely upon previous rulings of the Arkansas Supreme Court that were in direct conflict with *Troxel*.

Stamps v. Rollin, 297 Ark. 370, 761 S.W.2d 933 (1988) and *Golden v. Golden*, 57 Ark. App. 143, 942 S.W.2d 282 (1997), the cases upon which the court relied, are in direct contradiction to the holding in *Troxel*, supra. In these cases, the court condoned step-parent visitation based upon a showing that he/she stood *in loco parentis* with the minor child. Other than having to prove the status to have standing to request visitation, no other burden was placed upon the step-parent. The establishment of loco parentis merely placed the step-parent in the same position as a grandparent as one that would have standing to request visitation. Thus, the step-parent, under the rationale of *Troxel*, should bear the heavy burden of proving that it is in the best interest of the child for the court to ignore the wishes of the parent. Otherwise, a step-parent would be in the same position as a natural parent and a better position to obtain visitation than a biological grandparent.

2. There are due process implications in the use of the preponderance of evidence standard to determine the best interest of a child.

Even if a step-parent that stands *in loco parentis* is entitled to visitation, there is a due process issue in regards to the standard of proof necessary to establish such standing. The standard of proof applied by the trial court and the Arkansas Supreme Court to establish *in loco parentis* was a "preponderance of the evidence". Under due

process analysis the standard of proof should have been "clear and convincing evidence."

A case that exemplifies the abilities and the limitations of the courts in the area of family law is *Santosky v. Kramer*, 455 U.S. 745 (1982). This Court addressed whether the preponderance of the evidence standard unconstitutionally infringed upon the parent's due process rights. Finding that there was a "fundamental liberty interest of natural parents in the case, custody, and management of their children," this Court held that due process required the State to produce at least "clear and convincing evidence" of parental unfitness in proceedings to terminate parental rights.

As stated before, there is no dispute that the right of a parent to oversee, without government infringement, the upbringing of his/her children is a fundamental right protected by due process. Judge Thomas was correct that the standard of review to be applied is strict scrutiny when the State attempts to infringe upon a parent's fundamental right. *Troxel*, supra. The application of a standard of proof below "clear and convincing" evidence does not meet strict scrutiny standards. The State would only have a possible compelling interest to second-guess a fit parent's decision regarding visitation with a third party if there was clear and convincing evidence that the step-parent stood *in loco parentis*.

The mere fact that a person is a step-parent does not establish *loco parentis* status. The Arkansas Supreme Court has even stated that the providing of care for a child does not mean a person stands *in loco parentis*. *Stair v. Phillips*, 315 Ark. 429, 867 S.W. 2d 453 (1993). The status of *loco parentis* requires evidence of an emotional bond

between the person claiming the status and the child. The fact that Respondent provided care for the child without evidence of an emotional bond is not sufficient to establish standing to request visitation.[2]

3. Allowing non-parent visitation without evidence of harm to the child undermines the due process.

The establishment of *loco parentis* status merely creates standing for a person to request visitation, similar to the standing granted a grandparent by statute. It does not resolve the issue of whether the visitation should be granted against the wishes of the natural parent. Just because a person stands *in loco parentis* or is a grandparent, it does not mean that visitation is automatic. There is an issue of protecting the fundamental rights of the natural parent.

As Justice Souter noted, the requirement that there be a finding of harm to the children before visitation is granted to a non-parent is a necessary requirement to protect parents from judicially compelled visitation any time a judge believes he could make a better decision. *Id.* It has always been recognized that parental autonomy is protected by the constitution. In *Parham v. J.R.*, 442 U.S. 584 (1979), this Court stated that there is a presumption that a parent is legally fit and that a fit parent's decisions are in and of themselves in their child's best interest.

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[2] The only evidence of any emotional bond was that Austin referred to her as mother. The testimony from the non-parties to the case clearly show that there was no emotional bond between Respondent and Austin to justify a finding of *loco parentis*.

Thus, this Court has deferred to the parents in regards to the upbringing of their children.

Deference to parents can only be safeguarded by high standards. Although this approach was rejected by the majority of Justices in *Troxel*, there appears to be no other means available to protect the parent from unconstitutional intrusion by the State. Protection of fundamental rights requires strong measures that will insure that a judge will not substitute his opinion for a fit parent.

4. The use of the best interest test in determining step-parent visitation not only violates due process, but violates equal protection.

In response to *Troxel* and the Arkansas Supreme Court's interpretation of the State's own grandparent visitation statute, the Arkansas Legislature amended the grandparent visitation statute.

Under Ark. Code Ann. § 9-13-103, a grandparent can petition for visitation provided that the child is in custody of a parent and one of these conditions are satisfied:

> (1) The marital relationship between the parents of the child has been severed by death, divorce, or legal separation;
>
> (2) The child is illegitimate and the petitioner is a maternal grandparent of the illegitimate child; or
>
> (3) The child is illegitimate, the petitioner is a paternal grandparent of the illegitimate child, and paternity has been established by a court of competent jurisdiction.

Subsection (c)(1) of the statute provides that there is "a rebuttable presumption that a custodian's decision denying or limiting visitation to the petitioner is in the best interest of the child." This presumption can be rebutted by proof that

> (1) The petitioner has established a significant and viable relationship with the child for whom he or she is requesting visitation; and
>
> (2) Visitation with the petitioner is in the best interest of the child.

The statute even sets forth what factors are to be considered by the court to determine if there is a significant and viable relationship with the child and whether it is in the best interest of the child to grant the visitation. One of the elements that the grandparent has to show to prove it is in the best interest of the child is that the "loss of the relationship between the petitioner and the child is likely to harm the child."

Unlike a step-parent, a grandparent must show that it is in the best interest of the child by providing proof that the loss of relationship between child and grandparent will be harmful to the child. There is no requirement that the step-parent show harm. Instead, the step-parent need only show that there was a relationship with the child that was sufficient to create a standing of *in loco parentis*. At the present time, a step-parent has an easier burden to obtain visitation as opposed to a grandparent who is a blood relative.

Under equal protection and due process, a system that provides more rights to a non-blood relative than a blood relative in regards to being a part of a child's life is not justifiable and should not be approved by the Court. A

step-parent should have less of a right to participate in a child's upbringing as compared with a grandparent.

Petitioner was thus denied due process of law. This is also an important question that needs to be resolved by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD WORSHAM
320 Executive Court, Suite 306
Little Rock, Arkansas 72205
(501) 228-0668

Counsel of Record for Petitioner

GERALD ROBINSON, APPELLANT, vs. KAREN FORD-ROBINSON, APPELLEE

No. 04-1235

SUPREME COURT OF ARKANSAS

2005 Ark. LEXIS 280

May 5, 2005, Opinion Delivered

JUDGES: JIM GUNTER, Associate Justice. GLAZE, J., dissents.

OPINION BY: JIM GUNTER

OPINION: JIM GUNTER, Associate Justice

This appeal raises the issue of whether, in a divorce proceeding, a circuit court may award visitation to a stepparent when the natural parent objects. We hold that a circuit court may award visitation to a stepparent standing *in loco parentis* over the natural parent's objection, and we affirm the circuit court's decision.

Gerald Robinson and Karen Ford-Robinson began living together in August 1997, married on January 28, 2000, separated on May 7, 2003, and divorced on November 4, 2003. During that time, Gerald had sole custody of his son, Austin, who was less than two years old when Karen moved in with them. Austin's biological mother relinquished her parental rights in a New York divorce action, and has had no contact with Austin since he was eight months old.

In Karen's initial complaint for divorce, she alleged that Gerald was not a fit and proper person to have custody of Austin and asked that she be awarded custody. In her second amended complaint, she did not ask for custody, but instead asked that she be awarded visitation

with Austin. The circuit court granted full custody to Gerald and limited visitation to Karen, finding that Karen had stood *in loco parentis* to Austin since he was eighteen months old, that he recognized her as his mother, and that it would be in Austin's best interest to have visitation with Karen. Gerald filed a motion for reconsideration, which was deemed denied.

He then filed an appeal with the Arkansas Court of Appeals, arguing that the cases relied upon by the circuit court as authority to grant visitation[1] have been overturned by *Troxel v. Granville*, 530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000), and *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002). He argued alternatively that, if they have not been overturned, Karen failed to meet the standard of proof set forth in *Stamps v. Rawlins*. The court of appeals disagreed and affirmed the circuit court's decision. *Robinson v. Ford-Robinson*, ___ Ark. App. ___, ___ S.W.3d ___, 2004 Ark. App. LEXIS 739 (October 27, 2004). Gerald petitioned this court for review of the court of appeals' decision, and we granted the petition. When this court grants a petition for review of a decision by the court of appeals, we review the appeal as thought [sic] it had originally been filed in this court. *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003).

We review domestic-relations cases *de novo* on the record, but will not reverse a trial court's findings of fact

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[1] *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988)(holding that a stepparent may be awarded custody of a minor child, although the law recognizes a preference for a fit natural parent); *Golden v. Golden*, 57 Ark. App. 143, 942 S.W.2d 282 (1997) (court affirmed award of visitation to stepfather standing in *loco parentis* over objection of natural mother).

unless they are clearly erroneous. *Id.*; *Medlin v. Weiss*, 356 Ark. 588, 158 S.W.3d 140 (April 8, 2004). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Medlin, supra.* Finally, we give due deference to the superior position of the trial court to view and judge the credibility of the witnesses. This deference is even greater in cases involving child custody, as a heavier burden is placed on the trial judge to utilize to the fullest extent his or her powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Hunt v. Perry*, 355 Ark. 303, 138 S.W.3d 656 (2003); *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999).

Our *de novo* review of the record reveals the following. Gerald described Karen's relationship with Austin as one of "buddies." He testified that he and Karen discussed her adoption of Austin, but he told her it was not an option because Austin already had a biological mother. He admitted that he had described Karen as Austin's mother both in conversations and in writing over the years. He also acknowledged that he had executed powers of attorney for Karen so that she could get medical care for Austin when he was away, although he suggested that this was not unusual because he was in the military.

He testified that he objected to Karen having any contact with Austin after the divorce for several reasons. First, Karen told Gerald that one of the reasons she wanted a divorce was that she was a nanny, not a wife or mother. Second, since she left, Austin has not asked to spend any time with her and has never cried for her. Finally, Karen was seeing someone; although Gerald

admitted he was also seeing someone with whom he had a sexual relationship. He felt that visitation with Karen would confuse Austin in the event Gerald remarried and introduced a new "mother" into Austin's life.

Karen described herself at trial as Austin's mother. She testified that she entered Austin's life when he was approximately eighteen months old, that she had been his mother for the last seven years, and that she loved him as if she were his mother. She said that Austin has called her Mommy since he was just over two years old, and did not know that she was not his birth mother until he was in first grade. She described Austin as a very sweet, lovable child. She testified that she went to all of his games, parent-teacher conferences, and school functions. She said that she wanted visitation because she loved Austin and felt it would be in his best interest for them to continue their relationship. While she admitted that it might be confusing to Austin to end up having several mothers, she thought that it would be more confusing and damaging to him to sever the relationship because she was the only mother Austin had ever known.

Karen's mother testified that Karen and Austin had a very close relationship and that Karen was his mother in every sense of the word. She also stated that Austin referred to Karen as Mommy very early in their relationship. She believed Austin would benefit from visitation with Karen.

The assistant director of the after-school-care facility attended by Austin testified that she did not even know Karen was Austin's stepmother until Karen brought cookies to Austin after she and Gerald divorced. She testified that Austin was not enthused to see her. Serena

Dempsey, who had been babysitting for Austin once or twice a month since the divorce, testified that she had not seen Austin cry because he missed his mother and that when she asked him if he missed his mother, Austin said "no, not really." Gerald's mother testified that Austin was worried about his daddy being by himself and did not understand why his mother was "doing this" to his daddy.

Gerald's claim on appeal is that the circuit court erred in awarding visitation with Austin to Karen. His first argument supporting this claim is that *Stamps* – one of the cases upon which the circuit court relied for authority to grant visitation to a stepparent – was overturned by the United States Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000), and our decision in *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002). We reject this argument.

In *Troxel*, a plurality of the United States Supreme Court held that the State of Washington's grandparent-visitation statute was unconstitutional as applied in that case due in large measure to its "breathtakingly broad" scope allowing "any person" to petition for visitation "at any time." 530 U.S. at 67. The central problem with the statute, according to the plurality, was that it failed to accord a fit parent's decision "any presumption of validity or any weight whatsoever." *Id.* The Court recognized the presumption that a fit parent acts in the best interest of his or her child. 530 U.S. at 68. In light of this presumption, the Court held that a court that reviews a fit parent's decision regarding grandparent visitation "must accord at least some special weight to the parent's own determination," but did not elaborate on the nature or extent of that "weight." 530 U.S. at 70. Because of the breadth of the Washington statute allowing any person to petition for

visitation at any time, and the application of that statute by the trial court in failing to accord any special weight to the parent's determination of her daughters' best interests, a plurality of the Court held that the statute, as applied, violated the *Due Process Clause of the Fourteenth Amendment.* The Court expressly declined, however, to "define . . . the precise scope of the parental due process right in the visitation context[,]" noting

> that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." *Post*, at 2079 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the *Due Process Clause* as a *per se* matter.

530 U.S. at 73.

In *Linder*, we reviewed the constitutionality of Arkansas's grandparent-visitation statute in light of *Troxel*, and held that it was unconstitutional as applied. Like the Washington statute reviewed in *Troxel*, our statute did not give any presumptive or special weight to the parent's decision that grandparent visitation was not in the best interest of her child. Indeed, the statute's requirement that the court issue written findings when denying visitation, but not when granting visitation, effectively placed the burden of proof on the parent, in direct contravention of *Troxel*. Because the trial court had already determined that the mother in *Linder* was a fit parent – for all purposes except determining visitation – we held that the

Fourteenth Amendment right of Due Process attached and special weight should have been accorded to her decision.

In response to Gerald's argument, we hold that neither *Troxel* nor *Linder* overturns our ruling in *Stamps, supra*. In *Stamps*, we held that a stepparent could be awarded custody of a minor child, though we held it was not appropriate in that case. We restated the caselaw preference for natural parents in custody matters, and held that the preference must prevail unless it is established that the natural parent is unfit. *Id.* First, *Troxel* and *Linder* involved statutory visitation with grandparents rather than custody by stepparents. Moreover, the preference in *Stamps* is precisely what the courts in *Troxel* and *Linder* found lacking. That is, the central problem in *Troxel* and *Linder* was that the statutes at issue failed to accord a fit parent's decision "any presumption of validity or any weight whatsoever." 530 U.S. at 67. In *Stamps*, this court clearly accorded a fit parent's decision special weight, holding that a court must grant custody to the natural parent over a stepparent unless the natural parent is proven to be unfit. However, while *Stamps* certainly indicates that a court has authority to award visitation to a stepparent, we do not find that the natural-parent presumption in *Stamps* governs this case, as this case involves visitation by a stepparent, rather than custody.

Moreover, neither *Troxel* nor *Linder* precludes the visitation awarded by the circuit court in this case. The facts in the present case are distinguishable from those in both *Troxel* and *Linder*. First, the visitation rights in this case arose out of a custody determination in a divorce proceeding rather than from a lawsuit brought by nonparents pursuant to a statute. Visitation was incident to and

part of the circuit court's determination of custody. Morever [sic], and critical to our review in this case, the party awarded visitation in this case was found by the circuit court to stand *in loco parentis* to the child. In other words, the court granted visitation to a person it considered to be, in all practical respects, a non-custodial parent.

In *Standridge v. Standridge*, 304 Ark. 364, 803 S.W.2d 496 (1991), we cited Black's Law Dictionary (5th ed. 1979) defining "*in loco parentis*" as "in place of a parent; instead of a parent; charged factitiously with a parent's rights, duties, and responsibilities." In *Moon Distributors v. White*, 245 Ark. 627, 434 S.W.2d 56 (1968), we permitted a wrongful-death award to a decedent's stepdaughter to whom the decedent stood *in loco parentis*, noting that the stepdaughter lived in the home with her stepmother "as mother and daughter." Finally, this court has treated grandparents who stood *in loco parentis* differently from grandparents who did not. *See Johnson v. Tompkins*, 341 Ark. 949, 20 S.W.3d 385 (2000). In *Johnson*, we held that the grandparents had no right to present evidence on whether adoption would be in their grandchild's best interest. *Id.* We distinguished our decisions in *Quarles v. French*, 272 Ark. 51, 611 S.W.2d 757 (1981), and *Cox v. Stayton*, 273 Ark. 298, 619 S.W.2d 617 (1981), in which we held that grandparents had standing to intervene in adoption proceedings involving their grandchildren, because the grandparents in those cases stood *in loco parentis* to their grandchildren. We hold that a court may award visitation to a stepparent who stands *in loco parentis* to a minor child when it determines that it is in the best interest of the child.

Finally, Gerald argues that if *Stamps* was not overturned by *Troxel* and *Linder*, the circuit court erred in

holding that Karen stood *in loco parentis* to Austin. In this case, Karen was the only mother Austin had ever known, and Austin did not know she was not his birth mother until first grade. She had served as Austin's mother for six years. Karen described herself as Austin's mother; Austin called her Mommy. The fact that she told Gerald one of the reasons she left was because she was a nanny, rather than a wife or mother, appears from her testimony to have had more to do with her impression of her relationship with Gerald than with Austin. After a *de novo* review, we hold that the circuit court's finding that Karen stood *in loco parentis* to Austin was not clearly erroneous.

Affirmed.

GLAZE, J., dissents.

DISSENT BY: TOM GLAZE

DISSENT:

TOM GLAZE, Justice, dissenting. The majority opinion makes an attempt to distinguish our case in *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002), from the instant case. In doing so, this court relies heavily on our decision in *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988), and a court of appeals case, *Golden v. Golden*, 57 Ark. App. 143, 942 S.W.2d 282 (1997). Both of these cases preceded *Linder and Troxel v. Granville*, 530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000), but the majority court relies on them as holdings that recognize a preference for a fit natural parent, but also would allow a stepparent custody or visitation rights, if the judge believes the best interests of the child warrant such custody or visitation.

In *Stamps*, this court held that a trial judge may award custody of a child to a stepparent, but our case law establishes a preference for natural parents, and that preference must prevail unless the natural parent is unfit. The *Stamps* court concluded the preference is based on the child's best interests, and in recognizing the natural parent was found fit, this court ruled that custody of the child should have been left with his mother, not placed with his stepfather.

At this point, it is significant to mention that the majority opinion relies on most of what the *Stamps* case holds, but then (confounding to me) it seeks to distance itself from *Stamps* by stating that it did not find that natural-parent presumption (preference?) governs this case, as this case involves visitation by a stepparent, rather than custody.

The majority court seems to overlook the fact that our court in *Linder* fully adopted the Supreme Court's plurality opinion and the Court's rationale in *Troxel*. The language employed by *Troxel*, and by our court in *Linder*, is much stronger in favoring a fit parent than that found in our prior case law where a parent's custody and visitation rights were in issue when a grandparent, stepparent, or other third party sought the custody or visitation of a child.

Unlike our prior Arkansas case law, our court in *Linder* began its review with the analysis that Lea Ann Linder, a single parent, had a fundamental right under the *Fourteenth Amendment* in *prohibiting state intrusion* on her parenting of her son. The *Linder* court, quoting Justice O'Conner favorably, stated: "Impingement on a parent's fundamental liberty right to raise children

requires heightened review and that one 'special factor' that might warrant state interference was if the parent were declared unfit." Put another way, if a parent is unfit, then clearly, under this approach, the state intrusion with the relationship is warranted.

The *Linder* case involved grandparents' visitation rights given them with their grandson by the trial court, even though the boy's mother, Lea Ann, was declared fit. Lea Ann successfully reversed the lower court's award of visitation rights to the grandparents, but this court upheld Arkansas' Grandparent Visitation Act (GPVA) as facially constitutional, but concluded the act had been erroneously applied by the trial court. *See* Ark. Code Ann. § 9-13-101 (Repl. 20020; now Ark. Code Ann. § 9-13-103 (Supp. 2003).

It appears to me that, by this court's decision in *Freeman v. Rushton*, ___ Ark. ___, ___ S.W.3d ___, 2005 Ark. LEXIS 49 (January 27, 2005),[2] and its decision here today, our court is giving no real discussion or guidance regarding the *Linder* and *Troxel* holdings, and, instead, glosses over the constitutional, fundamental right a fit parent has concerning his or her child's care, custody, and control. So long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. To hold otherwise, if a judge disagrees

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[2] In fact, this court in *Freeman* failed to even mention the *Troxel* or *Linder* decisions, even though the issue was whether the circuit court had erred by granting custody to the child's maternal grandparents instead of the child's biological father, who was fit. On appeal, this court affirmed the trial court.

with the parents' estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, a court can disregard and overturn *any* decision by a fit, custodial parent concerning visitation whenever, as noted above, the third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests.

For these reasons, I respectfully dissent.

GERALD ROBINSON, APPELLANT v. KAREN FORD-ROBINSON, APPELLEE

CA 04-370

COURT OF APPEALS OF ARKANSAS, DIVISION THREE

2004 Ark. App. LEXIS 739

October 27, 2004, Decided

JUDGES: JOHN F. STROUD, JR., Chief Judge. PITTMAN and CRABTREE, JJ., agree.

OPINION BY: JOHN F. STROUD, JR.

OPINION:

JOHN F. STROUD, JR., Chief Judge

Appellant, Gerald Robinson, and appellee, Karen Ford-Robinson, were married January 28, 2000, separated on May 7, 2003, and a decree of divorce was entered on November 4, 2003. The parties had lived together since August 1997. Gerald had custody of his son, Austin, who was eighteen to twenty months old at the time Karen moved in with them; Austin's birth-mother's parental rights had been terminated by a divorce decree entered in the State of New York. At the time she filed for divorce, Karen initially alleged that Gerald was an unfit parent and asked that she be awarded custody of Austin; in a second amended complaint, she subsequently revised that request and instead asked that she be awarded visitation with Austin because of the mother-child relationship that she and Austin had developed since August 1997 and because it would be in Austin's best interest for her to have visitation with him. The trial judge found that Karen had stood *in loco parentis* to Austin since he was eighteen

months old, that he recognized her as his mother, and that it would be in Austin's best interest to have visitation with Karen. Gerald filed a motion for reconsideration, which was deemed denied; he then filed his notice of appeal. On appeal, Gerald contends that the trial judge erred in granting Karen visitation. Specifically, he argues that the trial court erred in relying on *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988), and *Golden v. Golden*, 57 Ark. App. 143, 942 S.W.2d 282 (1997), because those rulings were overturned by *Troxel v. Granville*, 530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000), and *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002). Alternatively, he argues that if this court holds that *Golden* and *Rawlins* were not overturned, then Karen "failed to meet the standard of proof set forth in *Rawlins*." We disagree with his arguments and affirm the trial court's award of visitation to Karen.

At trial, Gerald characterized Karen's and Austin's relationship as one of "buddies." He said that he and Karen had discussed her being Austin's mother, and he told her that adoption was not an option because Austin had a biological mother, Lisa Marie Robinson, although her parental rights had been terminated in their divorce. However, he admitted that he had described Karen's relationship with Austin as that of "mother" in e-mails and conversations that he had over the years. He acknowledged that he had executed powers of attorney for Karen so that she could get medical care for Austin when he was away, both prior to and during their marriage, but he said that was not unusual because he was in the military. Gerald objected to Karen having any contact with Austin after the divorce because he said that she had told him one of the reasons she left was because she was a nanny, not a

wife or mother. He also said that since she left, Austin had not asked for her or asked to spend any time with her, and that Austin had never cried for Karen. Gerald said that he did not want to confuse Austin because Karen had been seeing a man from work. However, he admitted that he was also seeing someone, and that he had a sexual relationship with her.

Gerald said that Karen met him at the door when he came home from temporary duty and told him that she had moved out of their residence. Prior to telling Gerald that she was leaving, Karen had taken Austin over to her new apartment without Gerald's knowledge and told him to pick out which room he wanted to be his room.

Gerald testified that he believed that Karen having visitation with Austin "would interfere with someone else playing a role model" in his life. He said that if Austin's biological mother wanted to be in his life again, he thought it would be her right to have some sort of contact. He also said that he hoped that he would meet someone else to marry that Austin could call mother, and he had concerns about there being "too many mothers" in Austin's life.

Karen testified that she came into Austin's life when he was approximately eighteen months old, that she had been his mother for almost the last seven years, and that she loved him as if she was his mother and had loved him since the day she "laid eyes on him." She described their relationship as "great," and said that Austin had called her "Mommy" since he was a little over two years old. She stated that Austin did not know that she was not his birth mother until he was in first grade. She said that Austin was a sweet, lovable child, and that she wanted to continue to have some type of relationship with him although

she had been very unhappy in her marriage to Gerald. She testified that she was not willing to try to prove that Gerald was an unfit parent.

In explaining her relationship with Austin, Karen said that she loved him and cared for him; that she went to all of his parent-teacher conferences, games, and school functions; and that she was a good mother and role model for him. She said that she wanted visitation because she loved Austin, they had a good relationship, and she felt that it would be in his best interest for them to be able to continue that relationship.

Karen admitted that she took Austin to her new residence and let him pick out a room before she told Gerald that she was moving out; however, she explained that she did not want Austin to think that she had "skipped town or abandoned him." She agreed that it might be confusing for Austin to possibly end up having three mothers, but she also said that she thought it would be confusing for him not to have the person whom he called mother for over six years in his life anymore. She said that Gerald had told her that they were a package deal – if she did not want him then she could not have Austin.

Tommye Jo Ford, Karen's mother, testified that Karen and Austin had a very close relationship and that Karen had immediately fallen in love with Austin when she met him. She said that the two of them really bonded as mother and son. She stated that Austin began referring to Karen very early in the relationship as Mommy. She said that Karen was Austin's mother in every sense of the word for over six years, and that she believed that Austin would benefit from any visitation he had with Karen. She said

that Austin was one of her grandchildren. She stated that she believed Gerald's resistance to Austin seeing her or Karen came from the fact that his mother had remarried somewhere around sixteen times, from what she had been told. However, she said that she was not saying that Gerald was an unfit father; in fact, she stated that she had nothing negative to say about Gerald's parenting ability.

Martha Wiley, an assistant director at Sylvan Hills Learning Center, testified that Austin was enrolled at the center and was a happy kid. She said that she did not know that Karen was his mother until Karen showed up at the center with cookies after she and Gerald had divorced. Wiley said that she had never seen Karen before, that Austin was not enthused to see her, and that he did not accept the cookies.

Linda Johnson, Gerald's mother, testified that Austin was worried about his daddy being by himself and did not understand why his mother was "doing this" to his daddy. She said that she had never seen Austin cry because he missed his mother.

Serena Dempsey, Austin's babysitter once or twice a month, said that she had not seen him cry because he missed his mother. She said that he did not ask about Karen, and once, when she asked him if he missed Karen, he told her, "no, not really."

Domestic relations cases are reviewed de novo, and the trial judge's findings will not be disturbed unless they are clearly against the preponderance of the evidence. *Golden v. Golden*, 57 Ark. App. 143, 942 S.W.2d 282 (1997). On appeal, Gerald argues that the trial court erred in granting Karen visitation with Austin. Specifically, he argues that the trial court erred in relying on *Stamps v.*

Rawlins, 297 Ark. 370, 761 S.W.2d 933 (1988), and *Golden v. Golden, supra*, because those rulings were overturned by *Troxel v. Granville*, 530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000), and *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002). We disagree.

We hold that the present case is distinguishable from *Troxel* and *Linder*, both of which concern grandparent visitation. Specifically, *Troxel* involved a statute from the State of Washington that allowed any person to petition the court for visitation rights at any time, and a trial court could grant visitation when it was determined that such visitation would serve the best interest of the child. In that case, the paternal grandparents petitioned for visitation with their two granddaughters after their son's death and after the girls' mother limited their visitation to one daytime visit per month. The superior court granted grandparent visitation one weekend per month, one week during the summer, and four hours on each of the grandparent's birthdays. The Washington Court of Appeals reversed the visitation order and dismissed the case, and the Washington Supreme Court affirmed that decision. The United States Supreme Court granted *certiorari* and affirmed the denial of visitation in a plurality opinion.

In affirming the denial of visitation and holding the Washington statute unconstitutional, the Supreme Court recognized the "fundamental right of parents to make decisions concerning the care, custody, and control of their children," 530 U.S. at 66, under the *Fourteenth Amendment*, and held that the "breathtakingly broad" statute infringed upon that fundamental right by permitting any third party who sought visitation to subject a parent's decision regarding visitation to state-court review. The *Troxel* court held that there was a presumption that fit

parents act in the best interests of their children, and that when the Washington Superior Court intervened, it gave no special weight to the mother's determination of her children's best interests, thus failing to provide any protection for the parent's fundamental right to raise her daughters. The Court held that if a fit parent's decision is subject to judicial review, there must be accorded at least some special weight to that fit parent's determination.

However, the Court held that it did not define the "precise scope of the parental due process right in the visitation context. . . . Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the *Due Process Clause* as a *per se* matter." 530 U.S. at 73.

In *Linder*, *supra*, our supreme court held that while our state's grandparent-visitation statute was not facially invalid, it was unconstitutional as applied. In so finding, the supreme court held that the trial court found the mother to be a fit parent for all purposes except the issue of making a decision about her son's relationship with his paternal grandparents. The court held that unfitness solely to decide visitation matters was not a compelling interest on the part of the State that warranted invasion of a parent's fundamental parenting rights and reversed and dismissed the order providing visitation to the grandparents. We also note Justice Hannah's dissent in *Linder*, in which he stated:

> I also write to emphasize that this decision is narrow in scope and applies only to visitation issues arising from application of Ark. Code Ann. § 9-13-103 (Repl. 2002). In other words, this decision is limited to an attempt by grandparents to

> obtain visitation under the subject statute. The analysis should not be confused and applied in a case where the State is determining custody, and visitation on other bases, including other statutory schemes, or under the State's exercise of its sovereign *parens patriae* power in protection of the children of this State.

348 Ark. at 357-58, 72 S.W.3d at 861.

We hold that the facts of the present case are distinguishable from *Troxel* and *Linder*. Here, we are not dealing with statute-mandated visitation rights; rather, stepparent visitation is a creature of case law. Furthermore, the situation in the present case is one of a person whom the trial court found had stood *in loco parentis* to the child rather than a person or persons who simply had a relationship with the child. We hold that the finding of an *in loco parentis* relationship is different from the grandparent relationships found in *Troxel* and *Linder* because it concerns a person who in all practical respects was a parent.

This court's decision in *Golden, supra*, is distinguishable from *Troxel, supra*, and *Linder*, *supra*, and we hold that it supports affirming the trial judge's decision to grant Karen visitation with Austin. In *Golden*, the trial judge found that the stepfather stood *in loco parentis* to the child and granted him visitation. On appeal, the natural mother argued that the trial judge erred in finding that the stepfather stood "*in loco parentis*" to the child; however, this court found no error in the trial judge's finding. Citing Black's Law Dictionary (6th ed. 1990), the court defined *in loco parentis* as "in the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities," and stated that the

supreme court had held in *Moon Distrib. v. White*, 245 Ark. 627, 434 S.W.2d 56 (1968), that a stepmother stood *in loco parentis* to the minor child when they lived in the same home as mother and daughter.

In *Golden*, this court held that the circumstances warranted the finding of *in loco parentis* because the stepfather had lived with the child as his father from October 1993 until November 1994 and from December 1994 until April 1995. Although the stepfather mistakenly believed that he was the natural father in that case, he was the only father the child had ever known. In the present case, Karen was the only mother that Austin ever knew, and Austin believed that she was his natural mother until he was in the first grade. Furthermore, Karen was involved in Austin's life for a much longer period of time than was the stepfather in the *Golden* case. We cannot say that the trial judge was clearly erroneous in finding that Karen stood *in loco parentis* to Austin. We also hold that *Golden* clearly indicates that the status of *in loco parentis* permits, where circumstances warrant, that a stepparent be granted visitation with a stepchild, and such circumstances are present in this case.

Gerald alternatively argues that Karen "failed to meet the standard of proof set forth in *Rawlins*." We find no merit in this contention. *Rawlins, supra*, involved whether a stepparent could gain custody of a stepchild, not whether a stepparent could be granted visitation. In that case, our supreme court held that a stepparent could be awarded custody if it was established that the natural parent was unfit; however, there was a preference for natural parents in custody matters when the natural parent was a fit and proper person for custody. In that particular case, although the supreme court held that a stepparent could be

granted custody, the court reversed the grant of custody to the stepfather because the trial judge had specifically found that the mother was a fit and proper person for custody. We do not find *Rawlins* to be instructive with regard to the particular situation before us.

We affirm the trial court's grant of visitation to Karen based upon the determination that she stood *in loco parentis* to Austin.

Affirmed.

PITTMAN and CRABTREE, JJ., agree.